APPEAL NO. 040489
FILED APRIL 26, 2004

This appeal after remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 25, 2003. The hearing officer determined that the impairment rating (IR) of the respondent (claimant) could not be determined and that, without an IR, it could not be determined whether claimant is entitled to supplemental income benefits (SIBs) for the first quarter. Appellant (carrier) appealed contending that: (1) the lumbosacral area was the region to be rated; (2) the designated doctor was accurate in his first report when he said that if the lumbosacral area was rated under the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000), the claimant's IR would be 10%; (3) Texas Workers' Compensation Commission (Commission) Advisory 2003-10 is dated July 22, 2003, and does not apply because it was not in existence when the designated doctor issued an amended report rating lumbosacral impairment and should not be applied retroactively; (4) Commission Advisory 2003-10 is not mandatory and it is not error if a doctor chooses not to apply it; and (5) Diagnosis-Related Estimate (DRE) Category III applies and claimant's IR should be 10%. Carrier contended that the Appeals Panel should render a decision that claimant's IR is 10%. Claimant responded that the Appeals Panel should affirm the hearing officer's decision and order. The Appeals Panel reversed the hearing officer's decision and remanded for the hearing officer to seek clarification from the designated doctor regarding the application of Commission Advisory 2003-10. Texas Workers' Compensation Commission Appeal No. 032536, decided November 13, 2003. The hearing officer sought clarification from the designated doctor and the designated doctor certified that claimant's IR is 25%. The hearing officer accorded presumptive weight to the designated doctor's certification and determined that claimant's IR is 25%. The hearing officer also determined that, because of the change in the IR, the qualifying period for the first quarter of SIBs changed. The hearing officer determined that it is impossible to determine claimant's entitlement to first quarter SIBs pending an evaluation of whether claimant met the criteria for entitlement during the qualifying period, based on a 25% IR. Carrier again appealed, contending that: (1) Commission Advisory 2003-10 is not applicable and need not be applied; (2) the hearing officer erred in determining that no other IR in evidence considered the fact and effect of claimant's multilevel fusion; (3) the great weight of the other medical evidence is contrary to the designated doctor's report; (4) claimant did not have radiculopathy; and (5) claimant was not entitled to SIBs because his correct IR was below 15%. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

There is no dispute in this case that claimant reached maximum medical improvement on June 12, 2002, and that the region primarily involved to be rated was the lumbosacral region. The designated doctor in this case initially certified a 15% IR, but based it on the thoracolumbar region, and did not consider Commission Advisory 2003-10. The designated doctor said that if the region to be rated was lumbosacral, then the correct IR would be 10%. In November 2003 the Commission sent a letter to the designated doctor asking him what the correct IR would be in light of claimant's multilevel fusion and Commission Advisory 2003-10. The designated doctor responded that if the advisory was considered to be in effect, "then DRE category IV would put the patient at 20%." The designated doctor indicated that he had not thought the advisory was in effect. The hearing officer wrote to the designated doctor in December 2003 and instructed the designated doctor to apply Commission Advisory 2003-10. The hearing officer also told the designated doctor that "this advisory would at a minimum place the claimant in a DRE category IV (20%)" and that claimant might possibly be in DRE Category V. On December 23, 2003, the designated doctor responded that he did not think the advisory was in effect, but if "you are asking me to retrospectively apply it to this case, then with the prior radiculopathy documented and a fusion, which adds [sic] that category IV, then that does, indeed, put him into category V at 25%." The hearing officer determined that the IR is 25% in accordance with this last report.

Carrier contends that Commission Advisory 2003-10 does not apply because preoperative x-rays were taken. In a December 11, 2003, report, Dr. T stated that preoperative x-rays were taken on two occasions and that "both of these entailed not only complete x-rays but x-rays with dye that was instituted, i.e. myelographic data." However, the record does not show that preoperative flexion and extension comparison x-rays were taken. The hearing officer considered the evidence in the record and decided what the evidence established. He determined that the preoperative x-rays tests for motion segment integrity were not taken and we conclude that the hearing officer's determination is supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Because these x-rays were not taken, the hearing officer did not err in determining that Commission Advisory 2003-10 applies.

Carrier contends Commission Advisory 2003-10 should not be applied retroactively and that the advisory is not mandatory and it is not error if a doctor chooses not to apply it. The designated doctor in this case indicated that the reason he had not applied the advisory was because he did not think it was effective, given the date it was signed. He did not indicate that other methodology would more accurately reflect the IR evident for claimant. *See* Commission Advisory 2003-10b, dated February 24, 2004. We conclude that the hearing officer did not err in relying on the advisory, which was in effect at the time of the hearing in this case. Texas Workers' Compensation Commission Appeal No. 032402-s, decided November 3, 2003.

Carrier contends that the great weight of the other medical evidence is contrary to the designated doctor's report. Carrier also asserts that the hearing officer erred in determining that no other IR in evidence considered the fact and effect of claimant's

multilevel fusion as prescribed by Advisory 2003-10. Carrier notes that Dr. T considered the August 14, 2001, surgery and determined that claimant's IR should be 10%. In deciding if any doctors had considered the multilevel fusion, the hearing officer apparently was referring to the fact that Dr. T believed preoperative x-rays had been taken and had not applied Commission Advisory 2003-10. The hearing officer considered whether the great weight of the other medical evidence was contrary to the designated doctor's report and whether the designated doctor's report was entitled to presumptive weight. We perceive no reversible error.

Carrier contends that claimant did not have radiculopathy. In his _____, report, the designated doctor said he could not elicit an ankle jerk on claimant's right side, noting that it was his "symptomatic side." In his April 8, 2003, report, the designated doctor said claimant has objective evidence of radiculopathy. The hearing officer considered the conflicting evidence and determined whether the great weight of the other medical evidence was contrary to the report of the designated doctor. We conclude that the hearing officer did not err in this regard and that he did not err in determining that the IR is 25%. The hearing officer's determinations are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Carrier assets that claimant was not entitled to SIBs because his correct IR was below 15%. We have affirmed the determination that claimant's IR is 25%. Therefore, we reject carrier's contentions in this regard. We perceive no reversible error in the hearing officer's determinations regarding SIBs entitlement.

We affirm the hearing officer's decision and order.

According to information provided by carrier, the true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

_____
Judy L. S. Barnes
Appeals Judge

CONCUR:

_____
Margaret L. Turner
Appeals Judge

_____
Edward Vilano
Appeals Judge